

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the decision by the ALJ should be modified. Claimant should be awarded benefits based on 6 percent permanent partial functional impairment.

Findings of Fact

1. Claimant worked for respondent delivering mattresses and box springs over a seven-state area. He began working for respondent in October 1995 and reported problems with his arms in May or June 1996. Claimant testified his arms began swelling, the forearms became painful, and his fingertips would quiver.
2. Claimant was terminated from his employment December 10, 1996, for insubordination.
3. Claimant saw Dr. Lynn D. Ketchum in January 1997 and was later examined and evaluated by Dr. Edward J. Prostic and Dr. Robert L. Coleman. Only Dr. Prostic and Dr. Coleman testified.
4. Dr. Prostic stated he agreed with Dr. Ketchum that claimant's complaints were consistent with bilateral flexor compartment syndrome. Although he found no loss of motion, no weakness, no loss of neurological function, and no instability, he rated claimant's impairment as 10 percent to each upper extremity or 12 percent of the whole body. Dr. Prostic testified claimant's condition was not one manifested by the parameters discussed in the *AMA Guides to the Evaluation of Permanent Impairment*. He also testified that he was justified in giving a rating other than provided for in the *Guides* by the following provision on page 63 of the Fourth Edition:

In a rare case, the severity of the clinical findings may not correspond to the extent of a musculoskeletal defect, as demonstrated with a variety of imaging techniques. This might occur in a patient in whom the loss of shoulder motion does not reflect the severity of an irreparable rotator cuff tear as demonstrated by MRI or visualization during surgery.
5. Dr. Coleman concluded that based on the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition, claimant has 0 percent permanent impairment.
6. The only imaging techniques done to evaluate claimant's injury were x-rays. The x-rays were normal. Dr. Prostic testified that compartment pressure studies should be done to confirm whether claimant suffers from flexor compartment syndrome.

Conclusions of Law

1. Claimant's date of accident was found to be December 10, 1996, and functional impairment is, therefore, to be determined according to the Fourth Edition of the *AMA Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein. K.S.A. 1996 Supp. 44-510e.

2. The Board finds claimant has a 6 percent general body impairment. The Board agrees in part, and disagrees in part, with respondent's contentions relating to application of the *Guides*. First, respondent argues that Dr. Prostic has improperly relied on the provisions on page 63 of the Fourth Edition to justify variance from the *Guides*. The Board agrees with respondent's argument on this point. The only imaging techniques done in this case were the normal x-rays and those cannot be used to justify increasing the rating or giving a rating where none is otherwise warranted.

Respondent next argues that the rating should be 0 percent based on the hypothetical example given on page 19 of the Fourth Edition of the *Guides*. The example given is of an individual with a repetitive trauma injury who develops pain and swelling while working but has a normal examination and the symptoms are relieved when she stops the work activity causing the symptom. Even though it is clear she cannot continue in the same work, the *Guides* indicate she has no permanent impairment.

The Board disagrees with respondent's contention that this hypothetical requires a 0 percent rating in this case. The circumstances of this case differ from the hypothetical. In this case Dr. Prostic has concluded claimant has flexor compartment syndrome. He testified that flexor compartment syndrome may require surgery if claimant continues with tasks that put force on his arms. These factors do, in the Board's opinion, distinguish the facts in this case from those in the hypothetical.

For these reasons, the Board agrees with Dr. Prostic that claimant has a ratable condition but disagrees with his assessment of the extent of the impairment. The Board finds, as indicated above, that claimant's impairment is more fairly rated as a 6 percent impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler on November 18, 1997, should be, and hereby is, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, George R.

Martin, and against the respondent, Customized Transportation, Inc., and its insurance carrier, Reliance National Indemnity Company, for an accidental injury which occurred December 10, 1996, for 24.9 weeks at the rate of \$338 per week or \$8416.20 for a 6% permanent partial functional impairment, making a total award of \$8416.20, which is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of September 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned would find that claimant has not met his burden of proving he has a permanent impairment based on the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition, as required by K.S.A. 1996 Supp. 44-510e.

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Lawrence, KS
Mark E. Kolich, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director